No. 92-469

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

CHARLES LOAGUE,

Petitioner

VERSUS

SUPER SAGLESS CORPORATION

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Should a jury be instructed on the *McDonnell-Douglas v. Green*, 411 U. S. 792 (1973), method of proving discrimination in an age discrimination case?

2. When an older, qualified employee is discharged and replaced by a much younger employee, should the jury be instructed that it may infer age discrimination?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is non-published. However, the opinion is an application of *Walther v. Lone Star Gas Co.*, which is published at 952 F. 2d 119 (5th Cir. 1992). The opinion in this case is included as an appendix to this Petition.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals entered June 15, 1992 by Writ of Certiorari under 28 USC 1254.

FEDERAL STATUTE INVOLVED

The federal statute involved is 29 USC 623(a), which says:

> It shall be unlawful for an employer...to discharge an individual...because of such individual's age.

STATEMENT OF THE CASE

Petitioner, Charles League, filed suit in the United States District Court for the Northern District of Mississippi claiming age discrimination in his discharge. The case was tried twice. The first trial resulted in a jury verdict for League. Record (R), 326-328. However, the District Judge granted a judgment notwithstanding the verdict for the Respondent, Super Sagless Corporation. R., 346-356. On appeal, the United States Court of Appeals for the Fifth Circuit reversed the judgment notwithstanding the verdict, but permitted a second trial. R., 340.

At the second trial, like the first one, League produced no direct evidence of age discrimination. Rather, relying on *McDonnell-Douglas Corp. v. Green*, 411 U. S. 792 (1973), he presented a purely circumstantial evidence case. He proved that he was qualified for his position since he had been employed by the company for over 26 years, with over 20 years of this spent as a supervisor. He proved that he was discharged. He proved that he was 56 years old and was replaced by a 23 year old with no experience. Transcript (T), 26, 29.

The employer countered with proof that League was replaced by the 23 year old because of poor performance. T., 101-239. Consistent with the *McDonnell-Douglas* model, League responded with evidence of pretext by demonstrating that the legitimate reasons given by the Defendant were, in fact, false. T., 243-306.

Since League had no direct evidence of age discrimination, he requested a jury instruction modeled on *McDonnell-Douglas Corp. v. Green, supra*. Specifically, League requested the following jury instruction:

> The Court instructs the jury that the law does not require a discrimination case to be proved by direct evidence. Such a case may be proved by circumstantial evidence. To prove a case of age discrimination by circumstantial evidence, it is necessary that the Plaintiff, Charles League,

prove the following factors:

1. That he is over 40 years of age;

2. That he was qualified for his position;

3. That even though qualified, he was discharged from his position;

4. That he was replaced by a substantially younger person.

Proof of the above four factors raises a presumption of age discrimination. To overcome this presumption of age discrimination, the Defendant is required to articulate or give legitimate, non-discriminatory reasons for the discharge. In this case, I charge you that Super Sagless has given or articulated non-discriminatory reasons for discharging Plaintiff....

(If) the reasons given by the Defendant, Super Sagless Corporation...were the real reasons for Plaintiff's discharge, then it is your duty to return a verdict in favor of Super Sagless Corporation.

On the other hand, if you find, from a preponderance of the evidence, that the reasons given by Super Sagless Corporation were not its real reasons for discharge, and were a mere pretext for discriminating against Loague, then you may find that Loague's discharge was the result of age discrimination and you may return a verdict in favor of the Plaintiff, Charles Loague.

R., 367-368.

The District Court refused the instruction. The District Court held that *McDonnell-Douglas Corp. v. Green* applies only in non-jury cases, and that juries must not be instructed on the *McDonnell-Douglas* presumption. R., 342-346. The United States Court of Appeals for the Fifth Circuit affirmed. While the First Circuit held in

Loeb v. Textron, Inc., 600 F. 2d 1003 (1st Cir. 1979), that a jury should be instructed on the *McDonnell-Douglas* model, the Fifth Circuit held that, under *Walther v. Lone Star Gas Co.*, 952 F. 2d 119 (5th Cir. 1992), juries are not to be instructed on the *McDonnell-Douglas* model.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RECONCILE THE CONFLICT IN THE CIRCUITS AS TO WHETHER A JURY SHOULD BE INSTRUCTED ON THE *MCDONNELL-DOUGLAS* MODEL FOR PROVING DISCRIMINATION IN A CIRCUMSTANTIAL EVIDENCE CASE.

Recognizing that employers are unlikely to admit that employment actions are discriminatory, *McDonnell-Douglas v. Green*, 411 U. S. 792 (1983) held that a Plaintiff need not adduce direct proof of discrimination in order to prevail in an action under Title VII of the Civil Rights Act of 1964. Rather, *McDonnell-Douglas* held:

> The Complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing:
>
> (i) that he belongs to a racial minority;
>
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
>
> (iii) that, despite his qualifications, he was rejected;
>
> (iv) that after his rejection, the position remained open and the employer continued to seek applicants for persons of complainant's qualifications....
>
> The burden must then shift to the employer to articulate some legitimate, non-discriminatory reason for Respondent's rejection....

> (Once such reasons have been articulated employee) must be afforded a fair opportunity to show that (employer's) stated reasons for rejection was, in fact, pretextual....

The Circuits are divided as to whether, in a jury trial, under the Age Discrimination in Employment Act, the jury should be instructed on this *McDonnell-Douglas* model of proof. In *Walther v. Lone Star Gas Co.*, the Fifth Circuit stated that a *McDonnell-Douglas* type instruction should not be given to the jury. In the present case, the Fifth Circuit followed *Walther*, holding:

> We recently discussed this issue in *Walther v. Lone Star Gas Co.*, 952 F. 2d 119 (5th Cir. 1992). In that age discrimination case, the Court had instructed the jury on the elements of a prima facie case, and the Defendant challenged the instruction on appeal. We observed that "it was inappropriate for the District Court to submit the issue of prima facie case to the jury"...
>
> We...considered it confusing and unnecessary for the court to instruct the jury on shifting burdens and presumptions....

The Fifth Circuit's rule that a jury should not be given *McDonnell-Douglas* guidance in considering an age discrimination case is contrary to the First Circuit's decision in *Loeb v. Textron, Inc.*, 600 F. 2d 1003 at 1017-18 (1st Cir. 1979), which held:

> Whether the jury is also instructed that the Plaintiff must establish the four elements of the *McDonnell-Douglas* type prima facie case...and that the employer's reason is a pretext will depend on whether the Plaintiff's age discrimination claim is provable in classic *McDonnell-Douglas* terms. If the principal ingredients of the Plaintiff's case are inferences that are to be derived from the underpinnings of the *McDonnell-Douglas* type case, the jury should be asked to make these findings. That is, elements fashioned from those in the *McDonnell-Douglas* prima facie case should be defined in the charge and the jury should be told that in order to prevail, Plaintiff must prove each element and also that Defendant's stated reasons

> for the discharge was a pretext. The jury should be told that if it finds all of the disputed elements, and the Defendant's reasons as a pretext, it would be warranted in finding for the Plaintiff on the ultimate issue of age discrimination.

600 F. 2d at 1017-18.

Cases which follow the First Circuit's rule that a *McDonnell-Douglas* type instruction should be given in a purely circumstantial evidence case include *Dehues v. Western Elect. Co., Inc.*, 710 F. 2d 1344, 1347 (8th Cir. 1983); *Perry v. Kunz*, 878 F. 2d 1056 (8th Cir. 1989); *Stanojev v. Ebasco Services, Inc.*, 643 F. 2d 914 (2nd Cir. 1981); *Golomb v. Prudential Ins. Co. of America*, 688 F. 2d 547 (7th Cir. 1982); *Blackwell v. Sun Elect. Corp., 696 F. 2d 1176 (6th Cir. 1973); and Kitchen V. Chippewa Valley Schools*, 825 F. 2d 1004 (6th Cir. 1987).

On the other hand, the Fourth Circuit follows the Fifth Circuit's rule that no *McDonnell-Douglas* instruction should be given. *Nelson v. Greenford, Inc.*, 788 F. 2d 205 (4th Cir. 1986).

Besides the fact that there is a conflict in the circuits, the Writ should also be granted because of the unsoundness of the Fifth Circuit rule. Absent an instruction that a jury may infer age discrimination from replacement of a 56 year worker with an inexperienced 23 year old, a jury has no basis upon which to find age discrimination. Absent such an instruction, it may think that direct evidence is required; whereas, the law is clearly settled that Plaintiff is not required to adduce direct evidence of discrimination. *McDonnell-Douglas, supra.*

Furthermore, the Writ should be granted because the Fifth Circuit rule is inconsistent with *Patterson v. McLean Credit Union*, 491 U. S. 164 (1989). *Patterson* involved a jury trial under 42 USC 1981, and it characterized the prima facie method of *McDonnell-Douglas* as being a "sensible, orderly way to evaluate the evidence..." If the *McDonnell-Douglas* formulation is a method of "evaluating the evidence", surely the jury must be told about it so it can "evaluate the evidence".

Another reason why it is so important that this Court hear this case is the recent enactment of the Civil Rights Act of 1991. The Courts of Appeals have not previously interpreted Title VII of the Civil Rights Act of 1964 to provide for trial by jury. See cases cited in *Hubbard v. Environmental Protection Agency*, 949 F. 2d 453 (D. C. Cir. 1991). Thus, the issue of jury instructions under the Civil Rights Act of 1964 has not previously arisen. However, with the right to jury trial now provided by §102 of the Civil Rights Act of 1991, all District Courts are now confronted with the question of how to instruct juries in Title VII cases. The issue will be a pervasive one in the district court, and this court should make an early determination of the issue so as to avoid the countless appeals that will undoubtedly be forthcoming if this Court does not inform the district courts on the correct method of instructing juries in employment discrimination cases. This Court should grant the Writ in order to instruct district courts on proper jury instructions in all employment discrimination cases, whether arising under the Civil Rights Act of 1991, or the Civil Rights Act of 1964, or the Age Discrimination in Employment Act.

Respectfully submitted,

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APPENDIX

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In The

United States Court Of Appeals For The Fifth Circuit

No. 91-7310

Summary Calendar

CHARLES LOAGUE,

Plaintiff-Appellant,

v.

SUPER SAGLESS CORPORATION

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Mississippi
(CA EC89-85-S-D)

Before KING, EMILO M. GARZA, and DeMOSS, Circuit Judges.
PER CURIAM:*

Charles Loague, a 56 year old employee of Super Sagless Corporation (SSC), was terminated in 1988 and replaced with a younger worker. He sued under the Age Discrimination in Employment Act, 29 USC 623, and won a jury verdict. The District Judge granted SSC's Motion for Judgment Notwithstanding the Verdict and condi-

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

tionally granted a motion for a new trial. On appeal, we reversed the j.n.o.v., but affirmed the grant of a new trial. *Loague v. Super Sagless Corp.*, No. 90-7014 (5th Cir. 1991) (unpublished). A second trial resulted in a jury verdict for SSC. Loague again appealed.

Loague's sole point on appeal is that the District Court erred in refusing to instruct the jury that, once he established the four elements of a prima facie age discrimination case,[1] an inference of discrimination arose which it was SSC's burden to rebut with evidence of a non-discriminatory motive. He contends that, absent this instruction, the jury was never told how discrimination could be proved. We recently discussed this issue in *Walther v. Lone Star Gas Co.*, 952 F. 2d 119 (5th Cir. 1992). In that age discrimination case, the Court had instructed the jury on the elements of a prima facie case and the Defendant challenged the instruction on appeal. We observe that "it was inappropriate for the District Court to present the issue of prima facie case to the jury." Once the Defendant has produced evidence of a non-discriminatory motive for discharge and the Plaintiff has (as in the instant case) come forward with evidence that the asserted motive is actually a pretext for discrimination. "the trier of fact should proceed directly to the ultimate issue of whether the Defendant intentionally discriminated against Plaintiff." Id. (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U. S. 711, 715-16 (1983). We went on to state: "Under the logic of *Aikens*, it is clear that the issue of whether a Plaintiff made out a prima facie case has no place in the jury room." In fact, we also considered it confusing and unnecessary for the Court to instruct the jury of shifting burdens of presumption. However, the erroneous instruction was not grounds for reversal in *Walther* where the Defendant failed to object at trial and the instruction did not constitute plain error. In his reply brief, Loague argues that *Walther's* statements about the propriety of jury instructions on the prima facie case are dicta and that the case is not

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[1]The elements are set forth in *Bienkowski v. American Airlines, Inc.*, 851 F. 2d 1503 (5th Cir. 1988). Loague had to show that (1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class (between the ages of 40 and 70) at the time of his discharge; (4) he was replaced by someone outside the protected class; or (5) by someone younger; or (6) otherwise show that his discharge was because of age. Id. at 1504-05.

applicable here because the district court in *Walther* actually gave the instruction. *Walther* may, indeed, be dicta, but it is a perfectly accurate statement of the law. In *Aikens*, the Supreme Court held that the discrimination analysis of *McDonnell-Douglas Corp. v. Green*, 411 U. S. 792 (1973)[2] applies only in the directed verdict or summary judgment context, not at trial. Accordingly, the Court need not instruct the jury on the shifting burdens established by *McDonnell-Douglas*, but need only instruct that the ultimate burden of proving discrimination remains with the Plaintiff at all times. *Powell v. Rockwell Int'l Corp.*, 788 F. 2d 279 (5th Cir. 1986); See also *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248 (1981). In this case, League clearly satisfied the prima facie case, SSC introduced evidence that his termination derived from a non-discriminatory motive, and League countered with circumstantial evidence tending to show that the asserted motive was pretextual. The Court's instructions accurately informed the jury that League had the burden of proving discrimination.[3]

SSC has requested that we award it damages and double costs because League's appeal is frivolous. See Fed.R.App.P. 38. In addition, SSC points out League did not cite *Walther* in his original brief despite the fact that it was decided shortly after the notice of appeal was filed. We take the drastic steps of awarding sanctions under Rule 38, "When the claim advanced is unreasonable, or it is not brought with a reasonable good faith belief that it is justified." *Stelly v. Commissioner*, 761 F. 2d 1113, 1116 (5th Cir.), cert. denied, 474 U. S. 851 (1985). We recently found sanctions appropriate when appellants, *inter* alia, argued positions directly contrary to existing

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[2]The *McDonnell-Douglas* analysis applies in the age discrimination context.

[3]League also relies on *Haring v. CPC Int'l, Inc.*, 664 F. 2d 1234 (5th Cir. 1981), a case that approved of jury instructions on a prima facie case. *Walther* makes clear, however, that *Haring's* treatment of the prima facie case as a factual matter for jury resolution is to be considered dictum in light of the Supreme Court's later decision in *Aikens*. *Walther*, 951 F. 2d at 127. League urges us to disregard *Walther's* overruling of *Haring*, citing the familiar rule that one panel of this Court may not overrule the decision of another panel. However, an intervening decision of the Supreme Court which changes or clarifies the law permits us to depart from earlier, inconsistent precedent. *Ketchum v. Gulf Oil Corp.*, 798 F. 2d 159 (5th Cir. 1986).

law without addressing or urging a change in the law. *Pillsbury Co. v. Midland Enterprises, Inc.*, 904 F. 2d 317, 318 (5th Cir.), cert. denied 111 S. Ct. 515 (1990).

The troubling aspect of League's conduct in this appeal is his utter failure to raise or address binding circuit precedent until forced by SSC to respond in his reply brief. League's opening brief gives the impression that the question is totally open in this Circuit, whether the jury should be instructed on the prima facie discrimination case. Indeed, in his statement regarding oral argument, League asserts that "This Court has never passed upon the issue of whether a jury should be told of the *McDonnell-Douglas* rules." In fact, this Circuit decided this very issue in *Powell*, a 1986 decision, and revisited it (in somewhat different form) in January, 1992, one month after the notice of appeal was filed and more than one and one-half months before League filed his opening brief. League failed to cite *Walther, Powell or Aikens*, the latter a Supreme Court case that directly addresses the propriety of using the *McDonnell Douglas* burden-shifting analysis at trial.

Although the law in this area is clearly contrary to League's basic position, an opening brief in which League in good faith acknowledged the cases and argued for a modification of the law might make the damages issue closer. League evaded existing law, however, and framed his appeal as presenting an issue of first impression in the circuit. We cannot sanction such tactics. Double costs of the appeal are assessed against League.

AFFIRMED.

DOUBLE COSTS ASSESSED.